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Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on October 30, 1945, and is ~~not~~ 151 F 2d 479 reported (R. 242-245). This opinion affirmed the judgment of the United States District Court for the Southern Division of the Northern District of Alabama. A petition

for rehearing was duly filed by petitioners and was denied by the Circuit Court of Appeals for the Fifth Circuit on December 1, 1945 (R. 248).

STATEMENT AS TO JURISDICTION

The decree of the Circuit Court of Appeals for the Fifth Circuit was entered October 30, 1945 (not reported), (R. 242-245), and a petition for rehearing was denied on December 1, 1945 (not reported), (R. 248). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938 (28 USCA 347). A petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was filed January 4, 1946, and an order allowing Certiorari was filed March 4, 1946 (R. 248).

STATEMENT OF THE CASE

W. Daniel Pinkerton and Walter G. Pinkerton, petitioners, were convicted in the District Court of the United States for the Southern Division of the Northern District of Alabama on a conspiracy count containing ten separate overt acts specifications in furtherance of the conspiracy. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, Case Number 11,006, and judgment of the lower court was reversed. After this reversal and while the case was pending, the grand jury, on April 17, 1945, indicted W. Daniel Pinkerton and Walter G. Pinkerton, with other named defendants, who are not parties to this action, on ten substantive counts and one conspiracy count for violation of the Internal Revenue Laws of the United States of America (R. 2-13). Demurrer was filed by both petitioners to the indictment, which demurrer

was overruled by the trial judge (R. 13 and 25.) A plea in abatement was filed by W. Daniel Pinkerton as to Counts 1, 2, and 4 of the indictment (R. 16, 17), and was sustained (R. 26). A plea in abatement by both petitioners to Count 11 was entered (R. 18) and this plea was overruled (R. 26). The trial Court submitted the case to the jury on all counts of the indictment as to Walter G. Pinkerton, and on Counts 3, 5, 6, 7, 8, 9, 10 and 11 as to W. Daniel Pinkerton.

A jury verdict of guilty on all Counts of the indictment, except Count 7, was returned against Walter G. Pinkerton and against W. Daniel Pinkerton on Counts 3, 5, 6, 8, 9, 10 and 11 (R. 32).

Each of the defendants was given a prison sentence and fine (R. 32-35), and both appealed to the Circuit Court of Appeals for the Fifth Circuit.

The appellee in that case, the United States of America, filed a motion to dismiss appellants' appeal in the Circuit Court of Appeals on the ground that notice of the taking of the appeal was filed too late. The Court made no decision on this motion to dismiss the appeal, basing this action on the fact that the United States of America obtained the same result as sought by the motion to dismiss the appeal because the case was affirmed (R. 243).

Count 1 of the indictment charges Walter Pinkerton and Daniel Pinkerton with the possession of eight pints of unstamped whiskey (R. 2).

Count 2 of the indictment charges the defendants with the possession of eight pints of whiskey with intent to defraud the United States of the tax thereon (R. 3).

Count 3 of the indictment charges the defendants with concealing whiskey with intent to defraud the Government of the tax thereon (R. 3).

Count 4 of the indictment charges the defendants with concealing, depositing or removing three pints of whiskey with intent to defraud the Government of the tax thereon (R. 4).

Count 5 of the indictment charges that the defendants did remove, deposit or conceal two gallons of whiskey with the intent to defraud the Government of the tax thereon (R. 4, 5).

Count 6 charges the defendants with concealing a gallon of whiskey with intent to defraud the Government of the tax thereon (R. 5).

Count 7 (R. 5) is omitted because the jury found the petitioners not guilty of this charge.

Count 8 of the indictment charges the defendants with removing, depositing or concealing certain goods and commodities, namely: a large quantity, to-wit, nineteen gallons of distilled spirits, commonly called whiskey, with the intent to defraud the Government of the tax thereon (R. 6).

Count 9 of the indictment charges the defendants with concealing one pint of whiskey with intent to defraud the Government of the tax thereon (R. 7).

Count 10 of the indictment charges the defendants with the unlawful possession of three and three-fourths gallons of whiskey without the container having stamps affixed thereto (R. 7).

Count 11 of the indictment charges the defendants with a conspiracy with others to combine, conspire, confederate and agree together to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803 and 3253, of the Internal Revenue Code of the United States. Sixteen overt acts were set out as having been done by one or more conspirators pursuant to said conspiracy and to effect the object of the conspiracy (R. 8-13). Some of the overt acts in the conspiracy count are the same acts set out in the counts charging substantive offenses.

The overt act number 2 (R. 10) is the same as the offense charged in Count 1 of the indictment (R. 2). Plea in abatement sustained as to this count by the trial court (R. 16 and 26).

The overt act set out as number 3 (R. 11) is explained by the fact that Daniel Pinkerton possessed Retail Liquor Dealers Licenses for the years 1933 to 1944, inclusive (R. 158).

The overt act number 6 (R. 11) is the same as the offense charged in Count 4 of the indictment (R. 4). Plea in abatement sustained as to this Count by the trial court (R. 17 and 26).

The overt act number 8 (R. 11) was the offense for which Daniel Pinkerton had been previously convicted and had served his sentence therefor (R. 159-160).

The trial court sentenced W. Daniel Pinkerton, alias Dan Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period

of thirty months, and fined one thousand dollars ($1,000.00), to stand committed under Counts 3, 5, 6, 8, 9 and 10; and further committed W. Daniel Pinkerton, alias Dan Pinkerton, to the custody of the Attorney General or his authorized representative for the period of two years, and fined five hundred dollars ($500.00), to stand committed under Count 11 of the indictment, said sentence of two years imposed under Count 11 of the indictment to run concurrently with sentence of thirty months imposed under Counts 3, 5, 6, 8, 9 and 10 of the indictment, and that said W. Daniel Pinkerton be further imprisoned until payment of said fines or until said W. Daniel Pinkerton is otherwise discharged as provided by law (R. 35-37).

The trial court sentenced Walter G. Pinkerton, alias Walter Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period of thirty months and fined five hundred dollars ($500.00), to stand committed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and to be committed to the custody of the Attorney General or his authorized representative for the period of two years under Count 11 of the indictment, the sentence of two years imposed under Count 11 to run concurrently with the sentence of thirty months imposed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and the said Walter Pinkerton to be further imprisoned until payment of said fine or until said Walter Pinkerton is otherwise discharged as provided by law (R. 32-35).

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit on May 2, 1945. On October 30, 1945, the Circuit Court of Appeals rendered an opinion sustaining the judgment of the lower court (not reported) (R. 243). A petition for rehearing was entered on be-

half of Daniel Pinkerton and Walter Pinkerton, which said petition for rehearing was denied on December 1, 1945 (not reported) (R. 251).

SPECIFICATION OF ERRORS

We desire to urge all errors assigned on the appeal to the Circuit Court of Appeals (R. 213-239). And further we contend that the Circuit Court of Appeals for the Fifth Circuit erred in the following respects:

1. In holding that if a jury finds that a conspiracy exists between two or more persons, defendants, it might find the defendants guilty of as many offenses as it had illegal objects, these objects being charged also as substantive offenses, and that for each of these offenses a greater penalty than the two year statutory penalty could be imposed.

2. In holding that a person may be convicted of an offense when the evidence is contrary thereto.

3. In holding in effect that a criminal conspiracy is the commission of the crime which it contemplates and violates and arises under the statute whose violation is its object.

4. In holding that a person may be convicted of an offense as a principal actor, on the theory of agency and not on the theory of his being an aider or abettor thereto.

5. In holding in effect that the theory of the pleader (grand jury) can determine whether or not a person charged with criminal offenses, and if convicted, will secure a greater or lesser penalty according to the manner in which the indictment is drawn.

6. In holding that the crimes involving substantive offenses are not merged into or with the criminal conspiracy when there is a complete identity between those acts which are essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offenses.

7. In holding in effect that even though a conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all, and applying this theory to hold true as to substantive offenses.

SUMMARY OF ARGUMENT

I. A person may not be convicted of an alleged substantive offense, when he was not the principal actor in the offense, nor participated therein, merely because it might be shown that he was a member of a conspiracy to commit these acts.

II. When a conspiracy is shown to exist, if it does exist, then the separate substantive offenses, become in effect separate counts charging a conspiracy.

III. One group of defendants cannot be subjected to a severe penalty while another group of defendants are subjected to a relatively light penalty merely on the whim of the pleader (grand jury).

IV. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy is said to be continuing but nevertheless single.

V. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy.

VI. Multiplicity of purposes in a conspiracy does not create several conspiracies.

VII. When only one conspiracy is shown, if it be shown, then a sentence of not more than two years imprisonment and a fine can be imposed.

VIII. Conspiracy and the substantive offenses are merged into one offense upon the commission of the substantive offense or offenses.

IX. It is necessary to prove that a defendant aided or abetted in the commission of an offense before he can be convicted of that offense, and it is not enough that he is merely shown to be a member of a criminal conspiracy.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 USCA 2803) provides in pertinent part:

> (a) No person shall . . . possess . . . any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. . . .
>
> * * * * *
>
> (g) Any person who violates any provision of this section . . . shall on conviction be punished by fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. . . .

Section 2810 (26 USCA 2810), provides in pertinent part:

> (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same . . .
>
> ~~Any~~ AND every person having in his custody . . . which is not so registered, shall pay a penalty of $500.00, and shall be fined not less than $100.00 nor more than $1,000.00, and imprisoned for not less than one month, nor more than two years.

Section 2833 of the Internal Revenue Code (26 USCA 2833) provides in pertinent part:

> (a) Any person who shall carry on the business of a distiller without having given bond . . ., or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax . . ., shall for every such offense, be fined not less than $100.00 nor more than $5,000.00 and imprisoned for not less than thirty days nor more than two years. . . . .

Section 2834 of the Internal Revenue Code (26 USCA 2834) provides in pertinent part:

> No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented . . . on any premises other than a distillery duly authorized according to law; and no mash . . . so made and fermented shall be sold or removed from any distillery before being distilled; and no other person . . . shall separate the alcoholic spirits from . . . and the tax paid thereon. Every person who violates . . . shall be fined . . . not less than $500.00 nor more than $5,000.00, and be imprisoned not less than six months nor more than two years.

Section 3253 of the Internal Revenue Code (26 USCA 3253) provides in pertinent part:

> Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer . . ., and wilfully fails to pay the special tax . . ., shall for every such offense, be fined not less than $100.00 nor more than $5,000.00, and be imprisoned for not less than thirty days nor more than two years. . . . .

Section 3321 of the Internal Revenue Code (26 USCA 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000.00 or be imprisoned for not more than three years, or both.

Section 3748 of the Internal Revenue Code (26 USCA 3748) provides in pertinent part:

> (a) No person shall be prosecuted, tried or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof, . . .

Section 37 of the Criminal Code (18 USCA 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (18 USCA 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

ARGUMENT

We do not waive any errors assigned on appeal to the Circuit Court of Appeals; we will not argue them in this brief but will confine ourselves to what we consider to be the most outstanding errors of said court. In this we desire to be as concise as possible and the majority of the additional errors assigned in this brief raise the question of whether one of the defendants would be guilty of a substantive offense when the evidence shows without a doubt that this particular defendant was not actively participating in such and had no interest in or with the alleged commis-

sion of the particular act or acts. The additional errors that we offer, are those we feel were committed by the Circuit Court of Appeals for the Fifth Circuit.

We contend that the evidence fully shows that as to the petitioner, W. Daniel Pinkerton, especially as to the substantive counts concerned, he was not guilty of the charges, and under no rules of evidence would this be true.

Only one theory could have been relied on by the Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court, and that theory seems to be that if a conspiracy be shown to exist or to have existed, then after the jury finds this to be true, the defendants may then be convicted of a substantive offense, even though the defendant had not participated therein or had no knowledge of such.

The Court, in its opinion in *Pinkerton, et al* v. *United States* (~~not reported~~ 151 F 2d 499) (R. 242, 244), stated among other things:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment."

The Court further states, and it quotes:

> "'Although conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 12 F. (2nd) 253."

These statements seem in effect to say that a conspiracy need not be charged in order to convict a defendant of a crime, even though he did not participate in it, had no knowledge of it, and was not connected with it, for an act performed by one is the act of all, if it has been found from the evidence that there exists in fact a conspiracy.

From this we can readily see that the Circuit Court of Appeals upheld the conviction on Counts 3, 5, 6, 8, 9, 10 and 11 as to W. Daniel Pinkerton and on Counts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, as to Walter G. Pinkerton on the theory that the evidence showed that a conspiracy existed, and, therefore, the act of one was the act of the other. Thus we see that all the counts that went to the jury were based on the theory that a conspiracy existed, and this is further evidenced by a statement in the District Court's charge to the jury:

> "In connection with those counts, those substantive things (meaning the first ten counts as to the petitioner, Walter G. Pinkerton, and the first ten counts except Nos. 1, 2, and 4 as to the petitioner, W. Daniel Pinkerton) after you gentlemen have considered all the evidence in this case if you are satisfied from the evidence beyond a reasonable doubt that at the time the particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment, if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, or object of the unlawful conspiracy, which you have found from the evidence existed." (R. 191-192).

The trial court seems to have had in mind also that a conspiracy need not be affirmatively alleged but only shown to exist by the facts in evidence, and seems to state that in order to convict Daniel Pinkerton of any one or more of the substantive counts, there must have been a conspiracy first found to exist.

With this in mind, we now are faced with the fact that each of the substantive counts become separate counts, each charging a conspiracy to violate a separate and distinct Internal Revenue Law of the United States. By the construction of the indictment and as reflected in the charge to the jury there seems to be only the question of a single agreement to commit acts in violation of several penal statutes. When the unlawful agreement contemplates bringing to pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single. *United States* v *Kissel*, 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124; *Brown* v *Elliott*, 225 U.S. 392, 56 L. Ed. 1136, 32 S. Ct. 812.

What difference is there in effect, between a count alleging a conspiracy and a count alleging the commission of a substantive offense, if one person can be convicted of the substantive offense if a conspiracy be shown to exist, even though not alleged, and basing such conviction on the conspiracy?

Is it just, equitable or reasonable that the whim of the pleader could subject one group of defendants to a severe penalty, and for similar offenses subject another group of defendants to only a relatively light penalty? For instance: The two petitioners are charged in an indictment containing eleven counts, the first ten being substantive offenses and the last being a conspiracy. If the jury should

find the defendants guilty under all eleven counts, what would prevent the court from sentencing each to a term of thirty-six years in the penitentiary and a fine totaling $55,000.00? Then assume that other defendants were charged in an indictment containing eleven counts, each of which charge a separate violation of the Internal Revenue Code, identically the same as those against the principals, but each count alleging a conspiracy to violate rather than the actual violation. Then if defendants were convicted under all counts they could only be sentenced to the maximum punishment allowed for the conviction of a conspiracy under Section 37 of the Criminal Code (18 USCA 88). This of course, assuming that the conspiracy is single.

Section 37 of the Criminal Code (18 USCA 88) provides:

> If two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The next question to be decided is whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies.

The earlier decisions of the Circuit Court of Appeals for the Sixth Circuit seem to follow the theory that each count of an indictment charging as distinct offenses the several illegal objects of one continuing conspiracy, that it might find the defendants guilty of as many offenses as

had illegal objects, and that for each such offense the two-year statutory penalty could be imposed. *Flesher* v. *United States* (CCA 6th.) 91 F. (2nd) 414; *Mayer* v. *United States* (CCA 6th), 94 F. (2nd) 493. The Circuit Court of Appeals for the Fifth Circuit seems to follow the same theory on the basis of its ruling in the case at bar.

The Supreme Court of the United States in the case of *Braverman* v. *United States*, 317 U.S. 49, 87 L. Ed. 23*, holds among other things, that a conviction upon the several counts of an indictment each charging conspiracy to violate a number of different provisions of the Internal Revenue Laws, where the jury's verdict is supported by evidence but of a single conspiracy, will not sustain a sentence of more than the maximum penalty for a single violation of the conspiracy statute. The Court states also in effect, that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object. The court further

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*In the Braverman [illegible] the [illegible] were indicted, with others, on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States. The seven counts respectively charged them with [illegible] violations of Sec. 37 of the Criminal Code (18 USCA [illegible]) [illegible] on the business of wholesale and retail liquor dealers without [illegible] the special occupational tax stamps required by statute, 26 USCA Sec. 3253; (2) to possess distilled spirits, the immediate [illegible] did not have stamps affixed denoting the quantity of [illegible] spirits which they contained and evidencing payment of all [illegible] taxes imposed on such spirits, 26 USCA Sec. 2803; [illegible] unstamped distilled spirits, the immediate containers of which did not have affixed the required stamps, 26 USCA Sec. 2833; [illegible] the business of distillers without having given bond as required by law, 26 USCA Sec. 2833; (5) to remove, deposit and conceal [illegible] spirits in respect whereof a tax is imposed by law with intent [illegible] United States of such tax, 26 USCA 3321; (6) to possess unregistered still and distilling apparatus, 26 USCA Sec. 2810, and (7) to make [illegible] fermented mash fit for distillation, on unauthorized premises, 26 USCA Sec. 2834.

stated that on the trial there was evidence from which the jury could have found that for a considerable period of time petitioners, with others collaborated in the illicit manufacture, transportation, and distribution of distilled spirits.

We do not find in the record of the case at bar any claim by respondent that there were separate agreements for such purposes, separately reached or arrived at, and unless it is so claimed, the conspiracy is still single and not several, however multifarious the purpose. *State* v. *Profita*, 114 N.J.L. 334, 176 A. 683; *Brown* v. *State*, 130 Fla. 479, 178 So. 153.

Multiplicity of purposes in a conspiracy does not create several conspiracies. *Frohwerk* v. *United States*, 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 204; *United States* v. *Manton* (CCA 2nd), 107 F. (2nd) 834; *Short* v. *United States* (CCA 4th), 91 F. (2nd) 614; *Pouce* v. *United States* (CCA 5th), 11 F. (2nd) 598; *Miller* v. *United States* (CCA 7th), 4 F. (2nd) 228, Writ of Certiorari denied in 268 U.S. 692, 69 L. Ed. 1160, 45 S. Ct. 511; *Murphy* v. *United States* (CCA 7th) 285 F. 801; *United States* v. *Anderson* (CCA 7th) 101 F. (2nd) 325; *Blockburger* v. *United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Albrecht* v. *United States*, 273 U.S. 1, 71, L. Ed. 505, 47 S. Ct. 250 (distinguished).

When only one conspiracy is shown then a sentence of not more than two years imprisonment and a fine can be imposed. *Frohwerk* v. *United States*, supra; *United States* v. *Manton*, supra; *Pouce* v. *United States*, supra; *Miller* v. *United States*, supra; *Murphy* v. *United States*, supra; *United States* v. *Anderson*, supra; *Ex Parte Rose* (DC) 33 F. Supp. 941.

Under the decision, as rendered by the Circuit Court of Appeals for the Fifth Circuit in the case at bar, the defendants were given a greater sentence than that set out as the maximum in Title 18, Sec. 88 USCA.

The Court in the case of *Wong v. United States*, 103 F. (2nd) 759, (CCA 3d) states:

"It is difficult to conceive of a crime committed by two or more without a conspiracy to commit it." The court continues:

"It is easy to distinguish them as two different offenses. (meaning conspiracy and substantive offense) and yet the truth is that the conspiracy is merged in the substantive crime upon its commission. Conspiracy indictments have become very common. At first the two offenses were charged in separate counts. Then was followed, as here, the practice of indicting only for the conspiracy. This often, and almost always, results in practical disadvantage to the defendants. Because of this the Supreme Court has cautioned trial courts to be solicitous to see that defendants are not prejudiced but are accorded all their legal rights—— conspiracy is a fact to be charged in an indictment and the truth of the charge proven by evidence."

The court states in *United States v. Sall*, 116 F. (2nd) 745, 747, 748 (CCA 3d):

"It was not sufficient merely to prove that he was a member of the conspiracy to manufacture illicit alcohol and that in the course of that conspiracy those particular (substantive) crimes were committed by other conspirators."

and that,

"It is still necessary to prove that the defendant, even though he had joined the conspiracy, had also

joined . . . in the concealment of alcohol which constituted the substantive offense with which he is charged."

The court further states that,

"It is the act of concealment with criminal intent, and not the previous agreement, which is the gist of that offense. To hold otherwise would be to ignore the difference in character between the crime of conspiracy and the substantive crimes which may result from it and enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any member of the group even though he had no part in it or even knowledge of it. To permit this would open the way for a conviction of a conspirator more than once for the same conspiracy, the substantive counts being, if the government's theory is accepted, in fact merely additional conspiracy counts each alleging one overt act. Where as here but one conspiracy has been shown a defendant may not be convicted twice of having joined it for that would be to place him twice in jeopardy for the same offense."

The court also states that one who joins a conspiracy to commit a crime may be convicted of the conspiracy even though he does not directly commit an overt act, but the rule is too broad if applied to one sought to be convicted as an aider or abettor in the commission of a substantive offense.

The Solicitor General points out, in the case at bar, that the substantive counts were neither submitted to the jury nor the conviction sustained below (Circuit Court of

Appeals) on the aider and abettor theory*, but upon the principle of liability of a conspirator for substantive offenses committed by another conspirator in carrying out the unlawful enterprise. This is exactly what the court held could not be done in the case of *United States* v. *Sall*, supra; that one conspirator may be convicted of the offense of conspiracy when any party to the conspiracy commits an overt act in furtherance of the conspiracy though the the one convicted did not actively participate in that overt act.

If this court permits Daniel Pinkerton to be convicted of substantive offenses, committed by others, in which he did not participate, then the field will be opened wide for mass convictions of persons, even though they had no connection whatsoever with the substantive offenses. The criminal laws should be strictly construed and followed. The government must prove all that it alleges in an indictment; why should this rule be relaxed when there is a conspiracy involved. It is not difficult to see how one alleged conspirator may be convicted of a conspiracy when an overt act was committed by another in furtherance of the conspiracy, but it is highly illogical to say that if a conspiracy be shown, then each member of the conspiracy is guilty of any substantive offense committed, especially when there is a complete identity between those acts which are essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense. *Laughter* v. *United States*, 295 F. 94 (CCA 6th).

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*Section 332 of the Criminal Code (18 USCA 550) provides: Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.